

across the line from conceivable to plausible.” *Twombly*, 500 U.S. at 555, 570; *see Iqbal*, 556 U.S. at 662. Under *Iqbal*, the court performs a two-step analysis. First, it separates factual allegations from allegations not entitled to the assumption of truth. Second, it determines whether the factual allegations, which are accepted as true, “plausibly suggest an entitlement to relief.” 556 U.S. at 681.

Under a motion to dismiss under 12(b)(6), the court must accept as true all factual allegations in the pleading and all reasonable inferences must be drawn in the non-movants favor. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam); *Ibarra v. United States*, 120 F.3d 472, 474 (4th Cir. 1997). This requirement applies only to facts, not legal conclusions, however. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009).

II. ANALYSIS

RPM states that the Court may not dismiss the second cause of action because of Federal Rule of Procedure 8(d)(2). Rule 8(d)(2) provides that “[a] party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.”

“In construing Rule 8(d)(2), which was previously Rule 8(e)(2), courts have found that ‘it would be inappropriate for the court to construe one claim in [the] complaint as an admission against the propriety of another alternative or inconsistent claim in the same complaint.’” *Purcell v. City of Greensboro*, 1:11CV577, 2012 WL 1718763 at *3 n.1 (M.D.N.C. May 14, 2012) (quoting *In re Lee Memory Gardens, Inc.* No. 02-82662C-7G, 2004 WL 3510103, at *2 (M.D.N.C. Nov. 14, 2004)).

Here, the Breach of Contract is set out in a different count than the Carmack Amendment Cause of Action. (Doc. 9). Therefore, the Court **DENIES** Defendant's Motion to Dismiss.

III. **DECRETAL**

IT IS, THEREFORE, ORDERED that Defendant Joe Tex Xpress, Inc.'s Motion to Dismiss (Doc. 15) be **DENIED**.

Signed: November 21, 2014

A handwritten signature in black ink, reading "Richard L. Voorhees", written over a horizontal line.

Richard L. Voorhees
United States District Judge

